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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 226.

JOEL W. LOCKWOOD

vs.

EXCHANGE BANK OF FORT VALLEY,
F. T. RAPE, TRUSTEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF OF

OLIN J. WIMBERLY AND
JOHN I. HALL.

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I.

In our original brief, on page 27, we called attention to the decision *In re* Camp, 91 Federal Reporter, page 745, by the judge of the Northern District of Georgia, in which decision he declined to enforce a general waiver of homestead in a note, on the ground, as will be gathered from reading the entire decision, that a court of bankruptcy was without jurisdiction to administer the bankrupt's exemption, meaning, as is necessarily inferred from the decision, that when a bankrupt selected property which he wished exempted and the trustee set it apart, the court was powerless thereafter to deal with it. The same learned judge has recently, *In re* Swords, 7 Vol., American Bankruptcy Reports, page 336, followed his decision *In re* Camp, *supra*. We call attention to one of the reasons which the learned judge gave for not enforcing a general waiver of homestead. *In re* Camp, 91 Federal Reporter, *supra*, on page 746, the judge used this language: "According to the decisions of the Supreme Court of Georgia, property exempted in bankruptcy has a very different status from that of property set apart and allowed by the Ordinary of the county as a homestead. In the former case—that of exemption in

bankruptcy—the bankrupt gets an absolute title. He may immediately sell it, or he may, according to its character, mortgage or pledge it. On the other hand, the title of a homestead, under the State law, is in the head of the family for the benefit of the family. His title is nominal during the existence of the family, the beneficial interest being in it; so that there is very little reason, in Georgia especially, for any action of the State officials when the title vests absolutely in the bankrupt by virtue of the exemption in the bankruptcy proceedings." We confess that we are at a loss to know why, if it be true that under the present bankruptcy law the bankrupt takes the title absolutely, it is that the learned judge failed to apply the State laws in determining whether Camp was entitled to the exemption which he asked for in the bankruptcy court. But if this is of any importance in determining this question, we call attention to the fact that the provision of the bankruptcy act of 1898 on the subject of exemption differs very materially from that of 1867, and all the decision of the Supreme Court of Georgia referred to by the learned judge in the 91 Federal, *supra*, were made in cases that arose under the bankruptcy act of 1867.

Section 14 of the bankruptcy act of 1867 provides that the judge shall, by an instrument under his hand, convey to the assignee all the estate of the bankrupt, with certain exceptions: First, certain enumerated property; second, "and such other property not included in the foregoing exception as is exempted from levy and sale upon execution or other process, or order of any court, by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year 1864." Under the laws and Constitution of this State, it is only the head of the family, or an aged or infirm person, who can take a homestead or exemption, and he takes it for the benefit of the family, unless it be for himself as an aged or infirm person. The title is always left in the head of the family, but the homestead or exemption interest is carved out and remains of force so long as the family exists for whose benefit the exemption was set apart. Under the laws of Georgia, the head of the family cannot sell or alienate it during the existence of the homestead exemption, without an order of the court. But when the homestead estate expires, the head of the family is left with the full and complete title to the property. That is, he never parted with

the title, but submitted to the setting apart of the property as an exemption for the benefit of his family, and when that expired there was no further charge upon the estate. The Supreme Court of Georgia construed the provision of the act of 1867, *supra*, to mean that the bankrupt himself was, by the express provisions of the act of 1867, given the exemption, that is, the entire title, and that he could alienate it, and it was subject to the payment of debts contracted by him after his adjudication in bankruptcy. But such exemption was good against pre-existing debts and judgments, unless the debts and judgments antedated the Constitution of 1868, under which exemptions in bankruptcy at that time were claimed.

Now the bankruptcy act of 1898 provides that "this act shall not affect the allowance to bankrupts of exemptions which are prescribed by the State laws of force at the time of the filing of the petition in bankruptcy in the State wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition." Thus it will be seen that the act of 1898 provides that the allowance to bankrupts of exemptions under the State laws shall not be interfered with. It does not, therefore, confer any right upon the bankrupt which the State law does not confer. There is no allowance of exemptions to a debtor under the laws of Georgia except for the benefit of his family, unless he is aged or infirm. It is apparent that there is a distinction between the act of 1867, which excepts from the operation of the deed of conveyance an amount of property which equals in value the property exempted from levy and sale, and excepts it for the benefit of the bankrupt, while under the act of 1898, the trustee does not get title to such property as the bankrupt is entitled to as an exemption under the laws of the State. It being true that a debtor is not entitled to an exemption under the Constitution and laws of Georgia, unless he be the head of a family, or is aged or infirm, it follows that the act of Congress means that if he is the head of a family, or is aged or infirm, and entitled to an exemption, he may have an exemption set apart to him, and it will be held and controlled by him for the benefit of his family under the laws of Georgia. This, we think, makes a marked difference between the act of 1867 and that of 1898, and the Supreme Court of Georgia may have properly decided that the title to property exempted under the act of 1867 was in the bankrupt, to do as he chose with it. While, if it had been set apart by the proper officer of the State,

that action would, as hereinabove set out, have left the debtor with the title, but the property charged with the homestead and exemption right for the benefit of his family. We think that, under the act of 1867, the exemption went to the bankrupt, while under the provisions of the act of 1898, it could not go to the bankrupt except to the extent that the bankrupt could have obtained an exemption under the laws of the State of Georgia, *i. e.*, for the benefit of his family during the existence of the family, or for his benefit if aged or infirm, and, therefore, the reason given by the learned judge in 91 Federal, *supra*, for declining to administer the law of the State of Georgia, which provides that a waiver bars the right of exemption, could not possibly apply to exemptions under the bankruptcy act of 1898. But, as hereinabove stated, we cannot see that the reason given by the learned judge could in anywise relieve the court from administering the laws of the State of Georgia in their entirety when dealing with applications for exemption in bankruptcy, which are only given in the manner, and to the extent, and on the condition that the State laws grant exemptions.

Since the decision *In re* Camp, *supra*, this same learned judge has decided five cases, in which he denied the right of the bankrupt to an exemption, placing that denial upon the provisions of the State law:

1st. *In re* Waxelbaum, 101 Federal Reporter, page 228, cited in our original brief on page 28.

2d. *In re* Williamson, 8 Vol., American Bankruptcy Reports, page 42.

3d. *In re* Stevens, 8 Vol., American Bankruptcy Reports, page 53.

4th. *In re* Boorstin, 8 Vol., American Bankruptcy Reports, page 89.

5th. *In re* West, 8 Vol., American Rankruptcy Beports, page 564.

Section 2830 of the Code of 1895, cited on page 4 of our original brief, provides that if, in an application for exemption, an applicant fraudulently omits property from the schedule, he shall be denied an exemption. This objection is to be made before the Ordinary when an application for exemption is made to that officer, as will be seen by reference to section 2836 of the Code of 1895, *supra*, quoted in full on page 5 of original brief, as the second clause of that section provides for an objection on the ground of fraud of any kind in the

application for exemption. The learned judge, in the cases above referred to, denied an exemption to the applicants for the violation of the foregoing provisions of the statute of the State. That is to say, the learned judge gave weight to certain objections made to the application of the bankrupt for exemption, which are provided for by the laws of Georgia, but *In re* Camp and *In re* Swords, *supra*, he declined to give effect to other objections which the Supreme Court of the State of Georgia has repeatedly decided may be made by a creditor, and if made before the Ordinary, such objections will defeat an exemption. We are unable to see why the learned judge can enforce a part of the law of Georgia and deny an exemption in bankruptcy, and refuse to entertain other objections which the laws provide may likewise be made by a creditor. The learned judge, by his decisions in the cases where he denied the exemption, enforced a portion of section 2836 of the Code of 1895, *supra*, and doubtless would enforce any objection provided for in that section of the Code were the same made before him. Now, that section provides that a creditor may object to the valuation of the premises platted as a homestead by the surveyor. If such objection were heard, and the realty claimed as a homestead exemption should in value exceed that allowed under the statute, certainly the bankruptcy court would have to administer the property, and carve out the amount of real estate the applicant would be allowed to make up his exemption, or have the property sold, and turn over to him an amount of money which he might be entitled to to make up his exemption. In that case he would hear evidence and he would determine, according to the laws of Georgia, how much, if anything, the applicant would be entitled to as an exemption.

II.

Objection is urged by counsel for Lockwood in this case that the bankruptcy court could not enforce a homestead waiver note as the enforcement of the waiver would be a denial of the right of the bankrupt to an exemption. We discussed this question in our original brief, and we refer now to an additional authority on that subject. Where an exemption is applied for, or obtained, an objection is made by a creditor who holds a debt superior to the homestead right, the homestead property can be sold, the creditor holding the superior right paid, and the balance in cash paid over to the debtor for the benefit of his family.

54 Ga., page 569.

If in any case the property in value exceeds the claim of the creditor who holds an exemption waiver, then a sufficiency of the property should be sold to pay off such claim, and the remainder turned over to the bankrupt for an exemption to be held under the laws of the State of Georgia.

III.

In our original brief, on page 25, we cited *In re* Garden, 93. Federal Reporter, page 433. That decision was made by the late Judge Bruce of the Northern District of Alabama, and in that case the judge decided that a creditor holding a waiver of exemption could defeat the application of the bankrupt to an exemption. In that case the debt was not sued to judgment. Since that decision was made, Judge Jones of the Middle District of Alabama has decided two cases; the first, *In re* Moore, 112 Federal Reporter, page 289; and the second, *In re* Tune, 8 Vol., American Bankruptcy Reports, page 285. Our attention has been called to these decisions since we prepared our original brief, and on examining these decisions closely, we are of the opinion that *re* Garden was not properly deceided under the laws of Alabama. *In re* Garden a creditor had what is called a homestead waiver note, and without obtaining a judgment, opposed the exemption applied for in the bankruptcy court. *In re* Moore, *supra*, Judge Jones quotes the law of Alabama on this subject as follows: "The fact of the waiver and its extent must be avered in the complaint, petition, or bill, and the fact of the waiver and its extent must be declared in the judgment or decree, and endorsed on the execution or other process issued thereon." The same judge decided *In re* Tune that a waiver may be used as an estoppel only after judgment, because the law of Alabama requires that the fact of a waiver be set out in the pleading, in the judgment, and endorsed on the execution. But such is not the law of Georgia. Pryor to the Constitution of 1877 of the State of Georgia, the Supreme Court of that State held, in Simmons *cs.* Anderson, 56 Ga., page 53, referred to on page 12 of our original brief, that a debtor having executed a mortgage and waived the benefit of exemption as to the mortgaged property, was estopped from thereafter asserting an exemption in such property. In Stafford, Blalock & Company against Elliott, 59 Ga., page 387, also referred to on page 12 of our original brief, the court held that a general waiver of exemption was not good and enforcible by the

courts, because it could not operate as an estoppel. This was the law of the State of Georgia up to 1877. The Constitution of 1877 provides that a debtor may waive or renounce in writing his right to the benefit of the exemption provided for by the Constitution. See original brief, page 13.

The Legislature, which was required to carry out that provision of the Constitution, in 1878 enacted that a debtor could waive or renounce his right to the benefit of the exemption provided for by the Constitution and laws of the State of Georgia, by waiver, either general or specific, in writing, simply stating that he does so waive or renounce such right. See original brief, page 13.

Construing the foregoing provision of the Constitution and the act of 1878, the Supreme Court of Georgia in the 65 Ga., page 676, used this language: "Under the Constitution of 1877 and the act of 1878, a written waiver of exemption and homestead is good *inter se*, without having the same alleged in the declaration or summons, judgment or execution, and is after judgment provable *aliunde*, whether the lien of the judgment be general or special, and whether the waiver be written on the contract or obligation, or on a separate paper." This decision shows the difference between the law of Georgia and the law of Alabama on this question, and if a waiver of homestead defeats an exemption in Georgia on the idea of an estoppel since the Constitution of 1877, then the waiver, without more, estops the debtor from taking the exemption. But we do not think that the enforcement of the homestead waiver depends alone upon the doctrine of estoppel since the Constitution of 1877, for, as will be seen by reference to page 18 of our original brief, a case in the 69 Ga. (see bottom of page 845, and top of page 846), in which it was held by the Supreme Court of Georgia that a general waiver, made prior to the adoption of the Constitution of 1877, and the application for exemption was not made until after the date of that Constitution, was fatal to the application. At the time the waiver was made, it could not be held to have estopped the debtor from taking the exemption, as will be seen by reference to Stafford, Blalock & Company *vs.* Elliott, *supra*, but inasmuch as the application was for an exemption under the Constitution of 1877, it was held by the court that such waiver of exemption was fatal to the right of the homestead applied for under that Constitution.

But we think in no sense does the doctrine of estoppel apply to an exemption waiver since the Constitution of 1877. A waiver does more than that. It absolutely and forever defeats the right of the debtor to an exemption. In the language of the Supreme Court of Georgia, in 77 Ga., page 343, to be found on page 17 of our original brief, "This waiver waives or vacates the title, the homestead title," and takes the homestead or exemption right from the debtor and his family as effectually as if he had given a deed or bill of sale to the property. We think, therefore, that the decisions by Judge Jones, construing the laws of Alabama in regard to exemption waivers of bankrupts is in nowise applicable to the Constitution and laws of Georgia.

Respectfully submitted,

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